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No. 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

vs.

C. H. LANGDEAU, RECEIVER FOR
I.T.C. INSURANCE COMPANY,
Appellee.

No. 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

vs.

C. H. LANGDEAU, RECEIVER FOR
I. T. C. INSURANCE COMPANY,
Appellee.

On Appeal from the Supreme Court of Texas

BRIEF FOR THE APPELLEE

OTHO C. BOYKIN
P. O. Box 12
Austin, Texas

KEITH, McCLARTY, McNICHOLAS
& WEISS
Esperson Tower Building
Houston, Texas

ROCHE, CARRUTH, TEELING
& COUNTISS
Liberty Building
Waco, Texas
Attorneys for Appellee

Baldwin Printing Company, Inc., 308 West 8th Street, Austin, Texas

SUBJECT INDEX

	Page
OPINIONS BELOW	2
STATUTES INVOLVED	2
STATEMENT	4
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. The Supreme Court of the United States does not have jurisdiction of these appeals because it is only an interlocutory order and not a final judgment.	9
II. Congress did not intend by U.S.C., Sec. 94, to create a broad area where neither Federal nor State Courts have jurisdiction.	12
III. 12 U.S.C., Sec. 94, is an affirmative grant of jurisdiction to designated Courts and not a restriction or limitation.	19
IV. 12 U.S.C., Sec. 94, was repealed by the proviso to the Act of July 12, 1882. (22 Stat. at L. 162).	26
V. This is a local action controlled by the decision of of CASEY vs. ADAMS, 102 U.S. 66, 26 L.Ed. 52.	28
CONCLUSION	34
PROOF OF SERVICE	36

TABLE OF CASES AND STATUTES

Page

Arnold vs. United States for the Use of W. B. Guimarin & Co., 263 U.S. 427, 68 L.Ed. 371, 44 Sup. Ct. 144 11

Bank vs. Alston, 165 So. 241 (Sup. Ct. 1936) 18

Bank of America vs. Whitney Central National Bank, 261 U.S. 171, 67 L.Ed. 594 33

Bank of the United States vs. Deveaux, 5 Cranch 61 ..... 12, 20, 21, 23, 24, 25

Brust vs. Bank, 184 Wis. 15, 198 N.W. 749 (Sup. Ct. 1924) 18

Casey vs. Adams, 102 U.S. 68, '26 L.Ed. 52 (1880) 9, 15, 28, 31, 32, 33, 34

Cassatt vs. Bank, 9 N. J. Mis. Rep. 222, 153 A. 377, (Sup. Ct. 1931) 18

Central Maine Power Co. vs. Maine Central R. R. Co., 93 Atl. 41 (1915) 32

Chaffee vs. Glen Falls National Bank & Trust Co., 123 N.Y.S. (2d) 635 (1953); Affirmed 128 N.Y.S. (2d) 539; Appealed to Court of Appeals denied 129 N.Y.S. (2d) 237 18

Claflin vs. Houseman, 13 U.S. 130, 23 L.Ed. 833 (1876) 21

Cope vs. Anderson, 331 U.S. 461, 91 L.Ed. 1602 (1946) 34

Curlee vs. Bank, 187 N.C. 119, 121 S.E. 194, (Sup. Ct. 1924) 18

DeCock vs. O'Connell, 246 N.W. 885; 86 A.L.R. 41, (Sup. Ct. 1924) 18

First National Bank of Charlotte, N. C. vs. Morgan, 132 U.S. 141, 33 L.Ed. 282 (1889) 16, 33

First National Bank vs. Fellows, ex Rel Union Trust Company, 61 L.Ed. 1283 (1917) 16

Fresno National Bank vs. Superior Court, 83 Cal. 491, 24 P. 159 (Sup. Ct. 1890) 18

Guerra vs. Lemburg, 22 S.W. (2d) 336, (1929); (Writ Dis.) 17

Leather Manufacturers' National Bank vs. Cooper, 120 U. S. 776, 30 L.Ed. 816 (1887) 27

Page

Lee vs. Bank, 1 Am. L. Dec. 385, 5 Ohio Dec. 21, 2 Cin. Sup. Ct. Rep. 298, 13 Ohio Dec. Rep. 913 (1872) 19

Levitan vs. Houghton Bank, 140 N.W. 1019, 174 Mich. 566 (Sup. Ct. 1913) 18

Market Street Railway Co. vs. Railroad Commission of the State of California, 324 U.S. 548, 89 L.Ed. 1171, 65 Sup Ct. 770 11

Merchants National Bank of Cedar Rapids vs. Henderson, 254 N.W. 65 (Sup. Ct. Iowa, 1934) 18

Monarch Wine Co. vs. Butte, 249 Pac. (2d) 291, (Dist. Ct. of App.) 19

Montgomery Building and Construction Trades Council vs. Ledbetter Erection Company, Inc., 344 U.S. 178, 97 L.Ed. 204, 73 Sup. Ct. 196 10

Okeechobee vs. Florida National Bank, 150 So. 124 (Fla. 1933) 18, 18

Osborn vs. The Bank of the United States, 9 Wheaton 204 (1824) 21, 25

Page vs. Town of Newbury, 34 Atl. (2d) 218 (1943) 32

Republic Natural Gas Co. vs. Oklahoma, 334 U.S. 62, 92 L.Ed. 1212, 68 Sup. Ct. 972 10, 12

Wichita Falls & S. R. Co. vs. McDonald, 141 Tex. 555 11

United States Code Annotated Statutes

	Page
12 U.S.C., Sec. 24 (1940 Ed.)	2, 7, 20, 26
12 U.S.C., Sec. 94 (1940 Ed.)	2, 7, 8, 9, 12, 13, 15, 16, 17, 19, 20, 21, 26, 28, 29, 30, 34, 35
28 U.S.C., Sec. 1257 (1940 Ed.)	7, 9

Revised Statutes of the United States

R.S. of U.S., Sec. 563	20
R.S. of U.S., Sec. 629	20
R.S. of U.S., Sec. 5136	2
R.S. of U.S., Sec. 5198	2, 8, 19, 20, 26, 28

United States Statutes at Large

1 Stat. at L. 181	20
12 Stat. at L. 668, Sec. 11	2, 20, 22
12 Stat. at L. 681, Sec. 59	19, 22
13 Stat. at L. 116, Sec. 57	20, 23
18 Stat. at L. 320	2, 8, 20, 26, 28
22 Stat. at L. 162 (Act of July 12, 1882)	3, 9, 26
36 Stat. at L. 1167	2, 8

Texas Revised Civil Statutes

(a)

Article 1995, Sec. 14	14
Article 1995, Sec. 18	15
Article 1995, Sec. 19	14
Article 1995, Sec. 20	15

(b) Insurance Code of Texas.

Article 21.28, Sec. 1(f)	4, 5, 30
Article 21.28, Sec. 2	29, 31
Article 21.28, Sec. 2(a)	4, 29
Article 21.28, Sec. 4(f)	3, 4, 5, 9, 29, 30

No. 90

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

vs.

C. H. LANGDEAU, RECEIVER FOR
I. T. C. INSURANCE COMPANY,
Appellee.

No. 91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

vs.

C. H. LANGDEAU, RECEIVER FOR
I. T. C. INSURANCE COMPANY,
Appellee.

On Appeal from the Supreme Court of Texas

BRIEF FOR THE APPPELLEE

PRELIMINARY STATEMENT

A single brief is filed by Appellee in reply to the separate appeals by MERCANTILE NATIONAL BANK AT DALLAS and REPUBLIC NATIONAL

BANK OF DALLAS, since the two appeals involve a single record, the same issue, and are to be submitted together.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Texas (R. 365-374) is reported at 341 S.W. (2d) 161.* The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas (R. 351-363) is reported at 331 S.W. (2d) 349 (Tex. Civ. App. 1960), there being no official reports for Texas Courts of Civil Appeals.

STATUTES INVOLVED

FEDERAL STATUTES

1. 12 U.S.C., Sec. 24 (1940 Ed.) (12 Stat. at L. P. 668, Section 11; 13 Stat. at L. P. 101, Section 8; Rev. Stat. of U.S., Sec. 5136): (Banks are empowered)

   "FOURTH. To sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons."

2. 12 U.S.C., Sec. 94 (1940 Ed.) (Rev. Stat. Sec. 5198; 18 Stat. at L. 320; 36 Stat. at L. 1167):

   "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such

*Not yet officially reported.

association may be established, or in any State, County, or municipal Court in the County or City in which said association is located having jurisdiction in similar cases."

3. APPLICABLE STATUTES AT LARGE:

(1) 22 Stat. at L. 162 (Act of July 12, 1882):

"That any association so extending the period of its succession shall continue to enjoy all the rights . . . granted and shall continue to be subject to all the duties . . . imposed by the Revised Statutes of the United States and other Acts having reference to National Banking Associations; and it shall continue to be in all respects the identical association it was before the extension of its period of succession: PROVIDED, however, that the jurisdiction for suits hereafter brought by or against any association established under any law providing for National Banking Associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such National Banking Associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

STATE STATUTES

(1) Article 21.28 of the INSURANCE CODE OF TEXAS, as amended, (Acts 1955, 54th Leg.,

pp. 737, 742, Ch. 267), captioned "Liquidation, Rehabilitation, Reorganization or Conservation of Insurers," Section 4(f):

> "Sec. 4. Actions.
>
> ". . .
>
> "(f) NEW LAWSUITS. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings insituted after the commencement of delinquency proceedings by or against the insurer or receiver."

(2) Article 21.28 of the INSURANCE CODE OF TEXAS, Section 1(f), in which the word "Court" is defined as follows:

> " 'Court' unless the same clearly appears to the contrary from the text of this article, means the Court in which the delinquency proceeding is pending."

STATEMENT

The plaintiff, C. H. LANGDEAU, is the duly appointed statutory Liquidator-Receiver for I.T.C. Insurance Company, a defunct Texas Insurance Corporation. He was appointed by the 98th District Court of Travis County, Texas, after a finding of insolvency, under the provivsions of Article 21.28, Section 2(a) of the Insurance Code of Texas. (R. 1-2, 346, 347).

This suit was instituted in the 98th District Court of Travis County, Texas, the same District Court in which the delinquency proceedings are pending, pursuant to the provisions of Article 21.28, Section 4(f), (Insurance Code of Texas), providing (R. 1, 366):

> "NEW LAWSUITS. The Court of competent jurisdiction of the County in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

The word "Court," is defined in Section 1(f) of Article 21.28, (Insurance Code of Texas), as follows:

> " 'Court' unless the same clearly appears to the contrary from the text of this arctile, means the Court in which the delinquency proceeding is pending."

The Receiver alleges that I.C.T. Insurance Company is a Texas Insurance Corporation, organized by a promoter named BEN JACK CAGE, who became its President, with intent to defraud the stockholders, policyholders and creditors; that he promoted the Company by credit sales of stock to members of organized labor and others; that I.C.T. Insurance Company was insolvent at the time of its inception and remained insolvent for the several years of its existence; that the various defendants in this suit joined at one time or another the conspiracy of the promoter and officers of the corporation to

fraudulently secure annual licenses from the Texas Board of Insurance on behalf of the corporation, when it was in fact insolvent, resulting in a fraud on its creditors, policyholders and stockholders. Specifically, the two Banks are charged with making large loans to the President of the corporation, BEN JACK CAGE, individually, and/or other individual defendants, on December 31st of each year, which sums were directly deposited by the Banks to the account of I.C.T. Insurance Company on deposit tickets made out by an officer of the Bank; said loans being made pursuant to loan committee's written memoranda that they were to be paid back three days later, on January 2nd, of the following year, and that such deposits were restricted and not subject to withdrawal; that each of said Banks knew, or in the alternative should have known, that the deposits of such large sums to the credit of I.C.T. Insurance Company, without a corresponding liability, was for the purpose of enabling the Insurance Company to support a financial statement that would satisfy the Board of Insurance Commissioners of Texas as to its solvency, and thereby induce such Board to grant a license for the succeeding year. It is alleged that as a result of these and other acts by the two Banks and other defendents, that I.C.T. Insurance Company, although in fact insolvent, was able to continue in business, selling millions of dollars worth of stock to organized labor and others, and to issue policies to thousands of policyhollers, and to thereby ultimately cause them losses totalling approximately fifteen million dollars. (R. 70, 71, 79, 80, 129, 130, 131, 168 through 172, 207 through 210.)

The two National Banks, Appellants herein, filed Pleas of Privilege under the Texas practice, asserting their absolute privilege to be sued in Dallas County, Texas, the County of their location, under the provisions of 12 U.S.C., Sect. 94 (1940 Ed.). (R. 324, 325).

The trial Court overruled both Pleas of Privilege (R. 343, 344), and the Supreme Court of Texas sustained the ruling of the trial Court (R. 365), and this matter is now before this Honorable Court on the single question as to whether or not in this peculiarly local statutory proceeding brought under the provisions of the Insurance Code of Texas by the statutory Liquidator-Receiver, in the Court in which the delinquency proceedings are pending, the Banks have an absolute right or privilege to be severed from this cause and be tried seperately from the corporate promoters, officers and directors, who are alleged to be co-conspirators in the fictitious year-end loans which enabled the I.T.C. Insurance Company to stay in business.

SUMMARY OF ARGUMENT

1. This appeal should be dismissed for want of jurisdiction, because the judgment appealed from is not a final judgment within the meaning of 28 U.S.C., Section 1257.

2. Congress has authorized National Banks "to sue and be sued, complain and defend, in any Court of law and equity as fully as natural persons." (12 U.S.C., Sec. 24). This authorization effective-

ly grants consent for National Banking Corporations to sue and be sued in both Federal and State Courts otherwise possesing jurisdiction under the the respective Constitutions and Laws; and Congress did not intend by 12 U.S.C., Sec. 94 (18 Stat. at L. 320, 36 Stat. at L. 1167, Revised Statutes of U.S., Section 5198), to disrupt the established jurisphudence of the States and to make it impossible in many instances for National Banks "to sue and be sued," in either State or Federal Courts, thereby creating a "no-man's land area" where no court, Federal or State, can entertain suits. Since a National Bank can only sue or be sued in a Federal Court under the same jurisdictional circumstances as individual citizens and corporations of the States in which they are located, and since National Banks can only sue and be sued in State Courts pursuant to the locality of actions according to State law, there are necessarily many instances in which it would be impossible for a National Bank to sue or be sued in either State or Federal Courts.

3. 12. U.S.C., Sec. 94, as originally enacted June 3, 1864, when viewed in its historical background, was an affirmative authorization for a National Bank, as a Federal Corporation, to sue and be sued in designated Courts, and not a limitation or restriction as to Courts otherwise possessing jurisdicition.

4. In the event 12 U.S.C., Sec 94 is construed to limit State Courts having jurisdiction of proceedings by or against National Banks, then it was expressly repealed by the provisio to the Act of

July 12, 1882, as being in conflict therewith. (22 Stat. at L. 162).

5. This suit is a "local action" by State Statute, within the rule of CASEY vs ADAMS, 102 U.S. 66, 26 L. Ed. 52, and is not controlled by the provisions of 12 U.S.C., Sec. 94; it being a suit brought by the statutory Liquidator-Receiver of an insolvent Insurance Company under the Insurance Code of Texas, which requires all suits by or against the Liquidator-Receiver be brought in a Court of competent jurisdiction of the County in which the delinquency proceedings are pending. Art. 21.28, Section 4(f), Insurance Code of Texas.

ARGUMENT

I.

Jurisdiction Of The Court

This appeal should be dismissed for want of jurisdiction, because the judgment appealed from is not a final judgment within the meaning of 28 U.S.C., Section 1257.

It is respectfully submitted that the case at bar does not meet the tests of jurisdiction as heretofore established by this Court and by the Federal Statutes.

This cause in its entirety involves in excess of one hundred parties, only two of whom are involved in the instant appeals. It is highly conceivable that other questions of federal import will be

raised in a trial on the merits of the cause, either by Appellants or other parties to the suit. To try one fragmentary part of the entire proceeding at this time would militate against the rules heretofore laid down by this Court respecting piecemeal review. MONTGOMERY BUILDING AND CONSTRUCTION TRADES COUNCIL vs LEDBETTER ERECTION COMPANY, INC., 344 U.S. 178, 97 L.Ed. 204, 73 Sup.Ct. 196; REPUBLIC NATURAL GAS CO. vs OKLAHOMA, 334 U.S. 62, 92 L.Ed 1212, 68 Sup.Ct. 972.

Furthermore, should Appellants be successful in obtaining a judgment in their favor on the merits of this cause, Appellants would undoubtedly acquiesce in the original determination of the venue issue. REPUBLIC NATURAL GAS CO. vs OKLAHOMA, supra.

Appellants' argument that the venue question may become moot if not reviewed by the Court at this time is effectively dealt with in this Court's opinion in MONTGOMERY, supra, where the Court stated:

> "It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. However appealing such agrument may be, it does not warrant us in enlarging our jurisdiction. Only Congress can do that."

This is an appeal from an interlocutory determination of venue in an action by the state-ap-

pointed Receiver of a defunct insurance corporation against Appellants and other defendants.

Pursuant to state practice, there has been absolutely no determination of any aspect of the merits of this case. The sole and only issue that has thus far been passed upon in this cause is that of venue. WICHITA FALLS & S.R. CO. vs McDONALD, 141 Tex. 555.

It is well settled that this Court is not bound by state practice in determining the finality of a judgment of a state court for purpose of determining jurisdiction on appeal. It is also well settled that the judgment appealed from must be an effective determination of the litigation, subject to no further review or corrcetion, and not a determination of a merely interlocutory step in the proceeding. MARKET STREET RAILWAY CO. vs RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, 324 U.S. 548, 89 L.Ed. 1171, 65 Sup. Ct. 770; ARNOLD vs UNITED STATES FOR THE USE OF W. B. GUIMARIN & CO., 263 U.S. 427, 68 L.Ed 371, 44 Sup. Ct. 144. In dismissing for want of jurisdiction the Writ of Error in the Arnold case, this Court succinctly stated:

> ", . . . A case may not be brought here by Writ of Error or appeal in fragments; . . . to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all parties, but as to the whole subject matter and as to all the causes of action involved; and . . . if the judgment or decree be not thus final and complete, the Writ

of Error or appeal must be dismissed, for want of jurisdiction."

It is, therefore, submitted that Appellants have failed to demonstrate this Court's jurisdiction in the instant appeals and fall within the language of this Court's opinion in the REPUBLIC NATURAL GAS CO. case, supra, to-wit:

> "Appellant, of course, has the burden of affirmatively establishing this court's jurisdiction." (Citing authorities). "The policy against premature constitutional adjudication demands that any doubts in maintaining this burden be resolved against jurisdiction."

II.

12 U.S.C., Section 94, Not Intended By Congress To Create A "No-Man's Land" Wherein No Court Has Jurisdiction

Congress in authorizing National Banks "to sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons," intended that National Banks could sue and be sued in any Federal or State Court otherwise having jurisdiction.

12 U.S.C., Sec. 94, as originally enacted in 1863 and 1864, was not a venue statute. It was undoubtedly intended as a jurisdictional statute, growing out of the historical experience in THE BANK OF THE UNITED STATES vs DEVEAUX, 5 CRANCH 61. It was thought to be necessary as a result of the decision in the DEVEAUX case.

but it is respectfully submitted that it was in fact unnecessary because this authority "to sue and be sued in any Court of law and equity, as fully as natural persons," was much broader.

Congress certainly did not intend by this language of 12 U.S.C., Sec. 94, when taken in its historical setting, to disrupt the established jurisprudence of the States and to make it impossible in many instances for a National Bank to sue or be sued, either in a State or Federal Court.

If the construction urged on this Court by the Appellants is adopted, then Congress will have created an effective "no-man's land area," where no Court, Federal or State, has jurisdiction.

This is well illustrated in the case of OKEECHOBEE vs FLORIDA NATIONAL BANK, 150 So. 124 (Fla. 1933), in which two National Banks, both necessary parties to the suit, were defendants. These two Banks were located in different Counties. The Florida Court effectively described the intolerable situation that would be created by such a construction of the Federal Statute, as follows:

> "If this be not true, then the Complainant below in this case, the appellant here, can never enforce its legal rights for the alleged breach of the contract. Both Banks are necessary parties to the suit. The suit could not be maintained against one under the allegations of this bill of complaint without the other being joined

> in that suit, and, if the Florida National Bank of Jacksonville may not be sued upon its joint contract in Okeechobee County and People's Bank of Okeechobee cannot be sued on its joint contract in Duval County, then there is no jurisdiction in which the complainant may maintain its suit."

This was a case where the two National Banks were necessary parties to the suit, and the presence of both Banks was required before the State Court could proceed. Other illustrations are not difficult to find. Suppose a National Bank sues in a State Court for title to real property located in a County different from that in which the Bank is located. Historically, as well as by Statute, such suits must be brought in the County or District wherein the real property is located. The Texas Statute on this subject, Article 1995, Section 14, Texas Revised Civil Statutes, 1925, states that such suits "must" be brought in the County where the land is situated. This must be true in most, if not all, of the other States of the Union. Yet, Appellants are saying that when a National Bank sues or is sued for title to real property, the suit must be brought in the County wherein the Bank is located. If under State practice, the suit cannot be brought in such County, then no Court, Federal or State, would have jurisdiction of such cause.

Another example is a suit in which a County is a party defendant, and which under local practice must be brought in such County. In Texas this is governed by Article 1995, Section 19, Texas Revised Civil Statutes.

A further example is a suit in which an Administrator of an Estate of a deceased person, or a guardian, is a party defendant, which commonly must be brought in the County wherein the administration or guardainship is pending.

A suit for mandamus against the head of a department of State Government is required in Texas to be brought in Travis County (State Capitol), Article 1995, Sec. 20, Texas Revised Civil Statues.

Suits to revise the proceedings of the County Court in matters of probate must be brought in the District Court of the County in which such proceedings were had. Article 1995, Section 18, Texas Revised Civil Statutes.

It is respectfully submitted that these provisions of the Texas Statutes mandatorily requiring that suits be brought in certain Counties are instances where the rule had a long historical background both in Texas and elsewhere.

It was undoubtedly with these conditions in mind that the Supreme Court of the United States has sustained the jurisdiction (and venue) of State Courts in Counties other than where the National Banks involved were located.

In CASEY vs ADAMS, 102 U.S. 68, 26 L.Ed. 52 (1880), the Supreme Court held that the Act of 1864 containing the same language as 12 U.S.C., Sec. 94, did not control the jurisdiction or venue of a suit to forclose a mortgage on real property

brought in a Parish in Louisiana wherein the land was located, despite the fact that a National Bank located in another Parish was a party defendant and urged that it had to be sued in the Parish wherein the Bank was located.

Likewise, the Supreme Court in FIRST NATIONAL BANK vs FELLOWS, EX REL UNION TRUST COMPANY, 61 L.Ed. 1233 (1917), speaking through Chief Justice White, decided that a quo warranto proceeding instituted at the State Capitol in Michigan in Ingram County could be sustained against the National Bank located in Bay City, Bay County, Michigan. The Bank urged that it could only be sued in its own County, and Mr. Justice Vandeventer in his dissent expressly asserts that in his opinion the Act of 1864 (now 12 U.S.C., Sec. 94) should have controlled.

Appellants urge the case of FIRST NATIONAL BANK OF CHARLOTTF, N. C. vs MORGAN, 132 U.S. 141, 33 L.Ed. 282 (1889). It is respectfully submitted that this case does not decide the point. This was a suit by Morgan against the National Bank to enforce the penalty created by Act of Congress for charging usurious interest. (Revised Statutes of United States, Section 5198). It will be recalled that at this time the language of 12 U.S.C., Sec. 94 was a part of this Usury Section of the Federal Statute. The suit was in a State Court in Cleveland County, North Carolina. The Bank appeared and made a defense to the suit without first entering a plea to the jurisdiction of the Court

or the venue. After losing the case in the trail Court, the National Bank asserted, for the first time, on appeal, that it could only be sued in the County where its Bank was located. Mr. Justice Harlan delivered the opinion of the Court and stated that is was a suit to recover penalty incurred under a law of the United States. He then went on to hold that the Bank had waived its privilege to be sued in the County of its location, and that the State Court in the other County had jurisdiction. Since the right or privilege of the Bank, if it had such, was waived, this case does not decide the point.

Further, this was a suit for a penalty created by Act of Congress by the very same Section of the Statute to which the present day language of 12 U.S.C., Sec. 94 was then appended, and the Court could very well have held that this language did restrict suits for the usuary penalty created by the same Section of the Act.

In addition to the foregoing FLORIDA case, ten (10) other State Courts have decided in particular cases that National Banks can be sued in Counties other than those in which the Banks were situated, and that the Federal Statutes do not control. Only two (2) State cases hold to the contrar

Cases supporting the Majority Rule are:

TEXAS: Guerra vs. Lemburg, 22 S. W. (2d) 336, (1929), (Writ Dis.)

IOWA:	Merchants National Bank of Cedar Rapids vs. Henderson, 254 N. W. 65 (Sup. Ct. Iowa, 1934).
NEW YORK:	Chaffee vs. Glen Falls National Bank & Trust Co., 123 N. Y. S. (2d) 635 (1953); Affirmed 128 N. Y. S. (2d) 539; Appeal to Court of Appeals denied 129 N. Y. S. (2d) 237.
MICHIGAN:	Levitan vs. Houghton Bank, 140 N. W. 1019, 174 Mich. 566 (Sup. Ct. 1913).
MINNESOTA:	DeCock vs. O'Connell, 246 N. W. 885, 86 A. L. R. 41 (Sup. Ct. 1924).
NO. CAROLINA:	Curlee vs. Bank, 187 N. C. 119, 121 S. E. 194, (Sup. Ct. 1924).
WISCONSIN:	Brust vs. Bank, 184 Wis. 15, 198 N. W. 749 (Sup. Ct. 1924).
NEW JERSEY:	Cassatt vs. Bank, 9 N. J. Mis. Rep. 222, 153 A. 377 (Sup. Ct. 1931).
ALABAMA:	Bank vs. Alston, 165 So. 241 (Sup. Ct. 1936).
FLORIDA:	Okeechobee vs. Florida National Bank, 150 So. 124 (Fla. 1933).
CALIFORNIA:	Fresno National Bank vs. Superior Court, 83 Cal. 491, 24 P. 157 (Sup. Ct. 1890).

Cases supporting the Minority Rule are:

CALIFORNIA: Monarch Wine Co. vs. Butte, 249 Pac. (2d) 291, (Dist. Ct. of App.).

OHIO: Lee vs. Bank, 1 Am. L. Dec. 385, 5 Ohio Dec. 21, 2 Cin. Sup Ct. Rep. 298, 13 Ohio Dec. Rep. 913 (1872).

In neither of these two minority cases can it be said that the State Statute was mandatory in fixing jurisdiction and/or venue, and therefore neither of these cases in fact bears on the specific point.

III.

12 U.S.C., Section 94, is Historically an Affirmative Grant and Not a Limitation or Restricton.

12 U.S.C., Section 94, as originally enacted June 3, 1864, when viewed in its historical background, was affirmative authorization for a National Bank, as a Federal Corporation, to sue and be sued in designated Courts, and not a limitation or restriction as to Courts otherwise possessing jurisdiction.

This first National Banking Act of 1863, 12 Stat. at L. 681, also provided in Section 59:

> "And be it further enacted that suits, actions and proceedings by and against any association under this Act may be had in any Circuit District or Territorial Court of the United States held within the District in which such Association may be established."

The National Banking Act of 1863 was repealed by the Act of June 3, 1864, and a new Banking Act was enacted, 13 Stat. at L., Chapter 116. Section 57 of this Act of 1864 included State Courts, as an addition to this language in old Saction 59.

Historical Background

The first National Banking Act of February 25, 1863, 12 Stat. at L. 668, Sec. 11, Fourth, authorized and empowered National Banks "to sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons." The present Statute, 12 U.S.C., Sec. 24 . . . FOURTH, repeats this authority in exactly the same language. This language does not enlarge the jurisdiction of any Court, Federal or State, but it does affirmatively grant authority for a National Bank to sue and be sued in any Court of law or equity, Federal or State, that would otherwise have jurisdiction.

Historically the language of 12 U.S.C., Sec. 94 (1940 Ed.) (13 Stat. at L. Page 116, Sec. 57); Revised Statutes, Sec. 563, 629; Revised Statutes, Sec. 5198; (18 Stat. at L. 320), was thought to be necessary by reason of the decision of this Court in BANK OF THE UNITED STATES vs. DEVEAUX, 5 CRANCH 85 (1809), which decided that the language in the Act of 1791, which granted the first Charter to The Bank of the United States, 1 Stat. 181, authorizing the Bank "to sue and be sued . . . in any Court of record, or any other place whatsoever," did not give the United States Circuit Court jurisdiction, since the then existing Judicial Acts

did not otherwise extend the jurisdiction of the Circuit Courts to include the Bank of the United States in this instance. The Court stated that this power granted to the corporation, ". . . is not understood to enlarge the jurisdiction of any particular Court . . ."

Shortly thereafter, in a subsequent case involving the second Bank of the United States, OSBORN vs. BANK OF THE UNITED STATES, 9 WHEATON 204 (1824), Chief Justice Marshall decided that the new and additional language contained in the Charter, that the Bank should "be made able and capable in law to sue and be sued . . . in all State Courts having competent jurisdiction, and in the Circuit Courts of the United States," authorized the Bank to sue and be sued in the Circuit Courts of the United States, and that Congress had the constitutional power to enact the Legislation.

This new language of the second Bank's charter was the outgrouth of the decision in the DEVEAUX case, and it is to be noted that "State Courts having competent jurisdiction" were included, although no case had decided that a State Court otherwise having jurisdiction under its own Constitution and Statutes would not have jurisdiction of a suit in which a National Bank was a party as plaintiff or defendant.

In fact, Mr. Justice Bradley of this Court, in CLAFLIN vs. HOUSEMAN, 13 U. S. 130, 23 L.Ed. 833, 838 (1876), had the following to say with reference to the DEVEAUX case:

"The case is exactly the same as that of the Bank of the United States. The first bank chartered in 1791 had capacity given it 'to sue and be sued . . . in Courts of record or in any other place whatsoever.'" (1 Stat. at L. 191).

"It was held in BANK vs. DEVEAUX, 5 CRANCH 61, that this did not authorize the Bank to sue in Courts of the United States, without showing proper citizenship of the parties in different states. The Bank *was obligated to sue in the State Courts.*" (Emphasis supplied). . . "The second Bank of the United States had express authority 'to sue and be sued in all State Courts having competent jurisdiction, and in any Circuit Court of the United States.' . . . In the case of OSBORN vs. THE BANK OF THE UNITED STATES it was objected that Congress had not authority to enable the Bank to sue in Federal Courts, merely because of its being created by an Act of Congress, but the Court held otherwise, and sustained its right to sue therein. No question was made of its right to sue in the State Courts."

Quite naturally when the first National Banking Act was passed on February 25, 1863, it not only included the language "to sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons," (12 Stat. 668, Sec. 11, . . . FOURTH); and it also contained the language that had been thought necessary as a result of the DEVEAUX case to give the Federal trial Courts jurisdiction, as follows (12 Stat. 681, Sec. 59):

"And be it further enacted that suits, actions and proceedings by and against any association under this Act, may be had in any Circuit, Dis-

> trict or Territorial Court of the United States held within the district in which such association may be established."

This was not a venue statute, but undoubtedly was considered necessary to give jurisdiction as a result of the historical experience in the case of the BANK OF THE UNITED STATES vs. DEVEAUX. This language was supposed to give the Cirucit Court, District and Territorial Courts jurisdiction that they would not otherwise have possessed.

Since the DEVEAUX case it seems to have been thought necessary to specifically authorize suits by or against the Bank of the United States in State Courts, although no case had ever decided that they did not have jurisdiction, by reason of the authority and power "to sue and be sued, in any Court of law and equity, as fully as natural persons." The original National Banking Act of 1863, which had not mentioned State Courts, was repealed and the Act of 1864 was passed, which inculded the following language (13 Stat. 116, Sec. 57):

> "That suits, actions and proceedings against any association under this Title may be had in any Circuit, District, or Territorial Court of the United States held within the District in which such association may be established, or in any State, County or Municipal Court in the County or City in which said association is located, havinug jurisdiction in similar cases."

It is the position of the Appellee, from a historical viewpoint, that it was thought necessary to expressly give the State Courts jurisdiction. This was not

a matter of venue. This is a part and parcel of the same Section that granted jurisdiction to the Federal Courts.

It is Appellee's position that this was a futile and unnecessary attempt by Congress to authorize National Banks to sue and be sued in designated State Courts when broader authority had already been granted to the National Banking Corporations "to sue and be sued . . . in any Court of law, as fully as natural persons." This point is made because Congress possessed no power to enlarge the jurisdiction of State Courts which they possessed under their respective Constitutions and Statutes; and it is submitted that this language is the result of the historical experience in the DEVEAUX case, and was an attempt to grant affirmative authorization, and is not a restrictive Statute limiting jurisdiction or venue.

The Supreme Court in BANK OF THE UNITED STATES vs. DEVEAUX, 5 CRANCH 85 (1809), clearly did not hold that the Circuit Courts of the United States did not have jurisdiction of a suit by or against the Bank of the United States, provided such jurisdiction otherwise existed under the then existing Judicial Acts; nor did it decide that a State Court otherwise having jurisdiction under the Constitution and Statutes of such State would not have jurisdiction of a National Bank. It is respectfully submitted that Chief Justice Marshall in the DEVEAUX case only decided that "this power, if not incident to a corporation, is conferred by every incorporating Act, and is not understood to enlarge the jurisdiction of any particular Court."

By the time of OSBORN vs. THE BANK OF THE UNITED STATES, 9 WHEATON 204 (1824), the Act of Incorporation (of the second bank) included additional language as a result of the DEVEAUX decision, as follows:

> "The Bank shall be made able and capable in law to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in the Circuit Court of the United States."

This language must necessarily have been the result of the decision in the case of BANK OF THE UNITED STATES vs. DEVEAUX, and the language with reference to State Courts having competent jurisdiction must have been added from a fear that the State Courts might not be held to have jurisdiction unless specifically mentioned. This language does recognize that Congress could not enlarge the jurisdiction granted to State Courts by their own Constitution and Statutes.

The truth of the matter is that the Supreme Court, speaking through Chief Justice Marshall in the OSBORN case, actually overruled the DEVEAUX case, although the opinion gives more than passing emphasis to the new language which specifically designated "the Circuit Courts of the United States." A careful reading of the opinion, however, reveals Chief Justice Marshall's stating in regard to the DEVEAUX decision—

> "Whether this decision be right or wrong, it amounts only to a declaration, that a general

capacity in the Bank to sue, without mentioning the Courts of the United States, *may* not give a right to sue in those Courts." (Empahis supplied).

It is respectfully submitted that the language of 12 U.S.C., Sec. 94, was added to the Statute in 1864 for basically the same reason, and was not intended as a limitation on the State Courts that could otherwise assume jurisdiction.

It is Appellee's position that 12 U.S.C., Sec. 24, . . . FOURTH ,authorizing National Banks "to sue and be sued, complain and defend, in any Court of law and equity, as fully as natural persons," has at all times authorized and empowered State Courts otherwise having jurisdiction to entertain suits by and against Banks, and that the further language contained in 12 U. S. C., Sec. 94, with reference to State, County and Municipal Courts was unnecessary and was intended as an affirmative grant of authority rather than a restriction on the jurisdiction of State Courts.

IV.

12 U.S.C. Repealed By the Proviso to the Act of July 12, 1882

The amendment of February 18, 1865, (18 Stat. at L. 320; Section 5198 of the Revised Statutes of the United States), which has come down to us as 12 U.S.C., Sec. 94, if it is to be construed as a restriction on State Court jurisdiction, was repealed by the Act of July 12, 1882 (22 Stat. at L. 162),

which first authorized the extension of Charters to National Banks for an additional twenty years, and then stated:

> "Provided, however, that the jurisdiction for suits hereafter brought by or against any association established under any law providing for National Banking Associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such National Banking Association may be doing business when such suits may be begun; And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

In LEATHER MANUFACTURERS' NATIONAL BANK vs COOPER, 120 U.S. 778, 30 L.Ed. 816 (1887), this Court stated with reference to this Act of 1882:

> "This was evidently intended to put National Banks on the same footing as the banks of the State where they were located for all the purposes of the jurisdiction of the Courts of the United States."

However, the language of the Act itself was not limited to jurisdiction of the Courts of the United States, but refers to "jurisdiction of suits thereafter brought by or against (national) banks 'shall be the same as, and not other than, the jurisdiction for suits by or against Banks not organized

under the laws of the United States which do or might do banking business where such National Banking Association may be doing business when such suits may be begun.'"

It is true that the only cases reaching the Supreme Court of the United States relating to this enactment involved the right of removal from State Courts to Federal Courts, and no decision exists with reference to whether this Act of 1882 repealed the conflicting part of Section 5198 of the Revised Statutes of the United States (1874) as amended by the Act of February 18, 1875. (18 Stat. 320).

This Act of 1882 was not repealed by Congress until June 25, 1948, when in passing the new Judiciary Act, it expressly included the proviso to the Act of July 12, 1882, in a long list of Statutes to be repealed, effective September 1, 1948.

As a matter of fact, this Act of 1882 was a part of the Banking Act and not a part of the judiciary provisions, and there is no indication as to why it was included in the repealing provision.

However, if it effectixely repealed the predecessor of 12 U.S.C., Sec. 94, its subsequent repeal sixty-six years later would not re-enact 12 U.S.C., Sec. 94.

V.

12 U.S.C., Section 94, Not Applicable To This Cause, A "Local Action"

This suit is a "local action" by State Statute, within the rule of CASEY vs ADAMS, 102 U.S.

66, 26 L.Ed. 52, and is not controlled by the provisions of 12 U.S.C., Section 94,; it being a suit brought by the statutory Liquidator-Receiver of an insolvent Insurance Company under the Insurance Code of Texas, which requires all suits by or against the Liquidator-Receiver be instituted in the Court of competent jurisdiction of the County in which the delinquency proceeding are pending, 21.28—Insurance Code of Texas—Section 4(f).)

Article 21.28, Section 2, of the INSURANCE CODE OF TEXAS, provides for the "conduct of delinquency proceedings against domiciliary insurers." It provides that the property and assets of such insurer shall be in the custody of the court (custodia legis) as of the date of the commencement of the "delinquency proceedings;" that the Reciever shall be vested, by operation of law, with the title to all of the property, and the Receiver shall, "subject to the direction of the Court, immediately proceed to conduct the business of the insurer, or to take such steps as may be necessary . . . for the purpose of liquidating, rehabilitating, reinsuring, reorganizing or conserving the affairs of the insuror."

In this case, C. H. LANGDEAU was and is the "Liquidator" designated by the State Board of Insurance, and is the duly appointed Receiver of I. C.T. Insurance Company under the provisions of Article 21.28, Section 2(a) of the INSURANCE CODE OF TEXAS.

C. H. LANGDEAU, Receiver, instituted this suit in the 98th District Court of Travis County, Texas.

the Court and County in which the "delinquency proceedings" are pending, under the express mandatory provisions of Article 21.28, Section 4(f), of said Insurance Code governing the institution of new suits:

> "NEW SUITS. *The court of competent jurisdiction of the County in which the delinquency proceedings are pending under this Article* shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver." (Empahsis supplied).

The word 'court" is defined in Section 1(f) of Article 21.28, as follows:

> "'Court' unless the same clearly appears to the contrary from the text of this Article, means the court in which the delinquency procedings is pending."

Admittedly the foregoing provisions of the Texas Statutes control the jurisdiction and venue of this action unless 12 U.S.C. Sec. 94 requires that the two Appellant National Banks be severed from the suit and that the suit proceed against them separately from their alleged co-conspirators, the officers and directors of the defunct Insurance Company.

This suit is a peculiarly "local action" in that it involves a Texas Insurance Company, organized under the Insurance Laws of the State of Texas, and regulated and supervised by the State Board of Insurance; it is a corporation whose business is

affected by the public interest; it is an insolvent Insurance Company which is being liquidated under express statutory authority by the "Liquidator" appointed by the State Board of Insurance, who is required by Statute to be appointed Receiver by the Court in which the delinquency proceeding is pending. (Art. 21.28, Sec. 2, Insurance Code of Texas).

The property and assets of the Company are in custodia legis, and the Liquidator is vested with title thereto. The Statute strictly and specifically regulates the Court in which a suit may be brought by or against the Receiver. (Article 21.28, Sec. 2, Insurance Code of Texas).

This case is governed by the decision in CASEY vs. ADAMS, 102 U.S. 68, 26 L.Ed. 52 (1880), which was a suit to foreclose a mortgage on real property brought in a Parish in Louisiana wherein the land was located. A National Bank located in another Parish was a party defendant, and urged that it had to be sued in the County wherein the Bank was located. The Supreme Court overruled the National Bank's plea, with this statement:

> ". . . This (present statute known as 12 U.S.C., Section 94) we think, relates to transitory actions only, and not to such actions as are by law local in their character. Section 5136 (present Statute 12 U.S.C., Sec. 24), subjects the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the Banking Act any evidence on the part of Congress to exempt banks from the ordinary rules

> of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared . . ."

This decision expressly included "such suits . . . as were local in their character, either by statute or the common law."

Clearly the present cast is local in character by statute.

CASEY vs. ADAMS did not limit the rule to the historic common law distinction between "local actions" and "transitory actions."

PAGE vs. TOWN OF NEWBURY, 34 Atl. (2d) 218 (1943) — Vermont, points out with reference to statutory local actions:

> ". . . We are not concerned here with what may have been the common law rule as to trial of local actions because, in this respect, that rule has been superseded by our statutes regulating the place where actions shall be brought . . . the case at bar is a local action because it is made so by the provisions of the statute."

This same principle is announced by the Supreme Court of Maine in CENTRAL MAIN POWER CO. VS. MAINE CENTRAL R.R. CO., 93 Atl. 41. (1915):

> "Under this statute replevin is a local action. (Citing authorities). When a statute prescribes the County in which a particular kind of action shall be brought the action is local."

It is respectfully submitted that a fair and careful reading of CASEY VS. ADAMS will demonstrate that it refers to "local actions," both statutory and common law, and is not limited to the common law distinction alone.

Appellants urge that this Honorable Court in FIRST NATIONAL BANK OF CHARLOTTE, N. C. VS. MORGAN, 132 U.S. 141, 33 L.Ed. 282 (1899), is contrary to and overruled CASEY VS. ADAMS. Such is not the case. It did not involve a local action, either at common law or by statute; it did not involve a State statute fixing jurisdiction and venue in a particular County; it did not purport to overrule CASEY VS. ADAMS, and did not cite or mention the case. This case involved a cause of action created by Act of Congress as a penalty for charging usurious interest. The Bank wholly failed to urge in the trial Court lack of jurisdiction or venue, but answered and defended the suit; and after losing, for the first time on appeal, asserted that it could not be sued in a County other than where it was located. The SupremeCou rt only decided that the Bank had waived its personal privilege by appearing and making the defense.

The next case chronologically is BANK OF AMERICA vs. WHITNEY CENTRAL NATIONAL BANK, 261 U.S. 171, 67 L.Ed. 594, wherein

Justice Brandeis expressly refused to determine this very question in the following language:

> "Whether a national bank could under any circumstances, be subjected, without its consent, to suit in a state or district other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case."

Finally, COPE vs. ANDERSON, 331 U.S. 461, 91 L.Ed. 1602, (1946), makes passing reference to 12 U.S.C., Section 94, although it was not in any way involved in the decision of the case.

The decision in CASEY vs. ADAMS has not been overruled or eroded by subsequent decisions, and it is respectfully submitted that the principle announced therein controls this case; it is a local action, and the 98th Judicial District Court of Travis County, Texas has jurisdiction and venue to try this cause.

CONCLUSION

Appellee respectfully submits, first, that this Court does not have jurisdiction of this appeal, because there has been no final judgment entered by the Texas Court in any way disposing of the merits of this cause, but only an interlocutory decision as to venue.

In the event that this Honorable Court finds that it has jurisdiction of this appeal, then Appellee re-

spectfully prays the Court to find that the 98th District Court of Travis County, Texas, the Court in which the delinquency proceedings against I.C.T. Insurance Company is pending, has jurisdiction to hear and determine this cause, and that for all of the reasons set out herein 12 U.S.C., Section 94, does not control the jurisdiction or venue of this proceeding.

Respectfully submitted,

CECIL C. ROTSCH
P. O. Box 13
Austin, Texas

KEITH, MEHAFFY, McNICHOLAS
& WEBER
Kaufman Trust Building
Beaumont, Texas

RICHEY, SHEEHY, TEELING
& CURETON
Liberty Building
Waco, Texas

By Cecil C. Rotsch
Of Counsel
Attorneys for Appellee

PROOF OF SERVICE

I, CECIL C. ROTSCH, one of the attorneys for C. H. LANGDEAU, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 8, 1962, I served copies of the foregoing Brief of Appellee on the Appellants by depositing the same in the United States Mail, with first-class postage prepaid, addressed to counsel of record for Appellants to each of them at the following post office addresses:

Marvin S. Sloman
Hubert D. Johnson
OF CARRINGTON, JOHNSON & STEPHENS,
1700 Mercantile Bank Building
Dallas 1, Texas

Attorneys for Appellant:
MERCANTILE NATIONAL BANK AT DALLAS.

Neth L. Leachman
1600 Republic National Bank Bldg.
Dallas 1, Texas

Attorney for Appellant:
REPUBLIC NATIONAL BANK OF DALLAS.

C. Rotsch

P. O. Box 18
Austin, Texas
Counsel for Appellee.

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 21 1962
JOHN F. DAVIS, CLERK

No. 14

In the

Supreme Court of the United States

OCTOBER TERM, 1961 2

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

On Appeal From the Supreme Court of Texas

APPELLANT'S REPLY BRIEF ON THE MERITS

MARVIN S. SLOMAN,
HUBERT D. JOHNSON,
Of Carrington, Johnson & Stephens,
1700 Mercantile Bank Building,
Dallas 1, Texas,
Attorneys for Appellant.

INDEX

	Page
I. Authorities Relied on by Appellee in His Point II Do Not Support His Contentions Concerning Them	1
A. Federal Decisions	1
B. State Authorities	3
II. The Historical Background of The National Bank Act (1864) Does Not Justify Appellee's Claim that the State Venue Provision of 12 U.S.C. §94 is Ineffectual. The Historical Context of the Statute Requires a Contrary Conclusion	4
III. As a Matter of Federal Law as Well as of State Law Appellee's Cause is Not a Local Action. Moreover, it Does Not Purport to be Local Under the Insurance Code of Texas	9
IV. Conclusion	12

Cases — Page

Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44 (1941) 10

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809) 5, 7

Bank of the United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904 (1824) 7

Casey v. Adams, 102 U.S. (12 Otto) 66 (1880) 6, 9-11

Claflin v. Houseman, 93 U.S. (3 Otto) 130 (1876) 7

Ex Parte Collett, 337 U.S. 55 (1949) 5

County of Okeechobee v. Florida Nat. Bank, 112 Fla. 309, 150 So. 124 (1933) 3

Crocker v. Marine National Bank, 101 Mass. 240 (1869) 4

Crofoot v. Giannini, 196 Misc. 213, 92 N.Y.S.2d 191 (1949) 4

Dennick v. Central R.R. Co., 103 U.S. (13 Otto) 11 (1881) 10

Fellows v. First Nat. Bank, 192 Mich. 640, 159 N.W. 335 (1916) 2

First National Bank v. Fellows Ex Rel Union Trust Company, 244 U.S. 416 (1917) 1-2

First National Bank v. Morgan, 132 U.S. 141 (1889) 2-3, 4, 6, 9

Gemsco, Inc. v. Walling, 324 U.S. 244 (1945) 5

Holt v. Wheeler, 301 S.W.2d 678 (Tex.Civ.App. 1957, error dism'd) 11

Leonardi v. Chase National Bank, 81 F.2d 19 (2d Cir.), *cert. den.* 298 U.S. 677 (1936) 2

Morris v. Missouri Pac. Ry. Co., 78 Tex. 17, 14 S.W. 228 (1890) 10

Page

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 5, 6, 7

Rabinowitz v. Kaiser-Frazer Corp., 198 Misc. 312, 96 N.Y.S.2d 638 (1950) 4

Raiola v. Los Angeles First Nat. Trust & S. Bank, 133 Misc. 630, 233 N.Y.S. 301-(1929) 4

Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850) 7

Stewart v. Baltimore & O. R.R., 168 U.S. 445 (1897) 10

Texas & P. Ry. Co. v. Gay, 86 Tex. 571, 26 S.W. 599 (1894) 11

Tunstill v. Scott, 138 Tex. 425, 160 S.W.2d 65 (1942) 3

Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799) 7

Zarbell v. Bank of America Nat. Trust & Sav. Ass'n, 52 Wash.2d 549, 327 P.2d 436 (1958) 4

United States Statutes

12 U.S.C. §94 (1940 ed.) 2, 3, 4, 5, 9, 10

12 U.S.C. §24 (1940 ed.) 6

JUDICIARY ACT OF 1789, §9 (1 STAT. 76) 2

THE NATIONAL BANK ACT (1864) (13 STAT. 99)

§8 (13 STAT. 101) 6, 8

§57 (13 STAT. 116) 4, 6, 7, 8

Revised Statutes §5198 (1875) 2, 9

STATUTES AT LARGE

1 STAT. 192, §3 (1791) 6

3 STAT. 269, §6 (1816) 6

13 STAT. 101 (1864) 6

Page

Texas Statutes

TEXAS INSURANCE CODE

Art. 21.28, §4(f) 11-12

TEXAS REVISED CIVIL STATUTES

Art. 1995, subd. 4 3

No. 90

In the

Supreme Court of the United States

OCTOBER TERM, 1961

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

On Appeal From the Supreme Court of Texas

APPELLANT'S REPLY BRIEF ON THE MERITS

I

AUTHORITIES RELIED ON BY APPELLEE IN HIS POINT II DO NOT SUPPORT HIS CONTENTIONS CONCERNING THEM.

We wish briefly to call attention of the Court to the following inaccuracies in appellee's characterization of authorities on which he relies in point II of Brief for the Appellee:

A. Federal Decisions

(1) Appellee says of this Court's decision in *First National Bank v. Fellows Ex Rel. Union Trust Company*, 244

U.S. 416 (1917), that "The Bank urged that it could only be sued in its own County." The report of the case does not indicate that the defendant bank urged such a contention in this Court. The opinion of the Supreme Court of Michigan in the case does not indicate that the defendant bank urged any such contention either in the trial court or in the Michigan Supreme Court. *Fellows v. First Nat. Bank*, 192 Mich. 640, 159 N.W. 335 (1916). Accordingly, we pointed out in our opening brief (p. 35) that, like the *Morgan* case, the venue point was apparently not raised and the case was defended on the merits alone.

(2) Appellee implies that what was held and what "the Court could very well have held" in *First National Bank v. Morgan*, 132 U. S. 141 (1889) related to usury penalty suits only. Such implication is incorrect. Mr. Justice Harlan's discussion of "penalties and forfeitures" was necessary to the completely unrelated jurisdiction question involving §9 of the Judiciary Act of 1789. Appellee would flatly so limit the *Morgan* decision in his point V (Brief for the Appellee, p. 33). This Court did not even suggest in the *Morgan* case that Rev. Stat. §5198 (the statute codified in 12 U.S.C. §94) applied only to actions or proceedings against national banks for penalties and forfeitures. Such contention has been forcefully repudiated. *Leonardi v. Chase National Bank*, 81 F.2d 19 (2d Cir.), *cert. den.* 298 U.S. 677 (1936).

Appellee's suggestion that in the *Morgan* case the Court had some doubt as to whether the defendant bank had any

such "right or privilege" is completely unjustified in view of the Court's emphatic statement (132 U.S. at 145):

> "But without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and, if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, *must have been recognized.*"*

B. State Authorities

(1) Appellee refers (Brief for the Appellee, pp. 14-15) to various Texas venue statutes relating to actions which a national bank might bring *against* certain types of defendants. Such Texas statutory provisions are inapposite, because 12 U.S.C. §94 by its terms relates only to "actions and proceedings *against*" national banks. Moreover, even an action *against* a national bank a co-defendant of one of the types listed by appellee would be transferable in Texas to the home county of the bank. Art. 1995, subd. 4, Tex. Rev. Civ. Stat.; *Tunstill v. Scott*, 138 Tex. 425, 160 S.W.2d 65 (1942).

(2) *County of Okeechobee v. Florida Nat. Bank*, 112 Fla. 309, 150 So. 124 (1933) held—whether rightly or wrongly—that the bank's venue right was unavailable on grounds of contractual waiver and estoppel. Mr. Justice Terrell's carefully-reasoned analysis of 12 U.S.C. §94, in conflict with appellee's contentions, was not questioned by the majority opinion.

*Emphasis ours throughout.

(3) In appellee's citation of state cases (Brief for the Appellee, pp. 17-19), he says that there are "only two (2) State cases to the contrary" to his asserted state majority rule. Appellee overlooks the following state decisions contrary to appellee's contention, listed in Appendix C to Brief for the Appellant: *Crocker v. Marine National Bank*, 101 Mass. 240 (1869); *Raiola v. Los Angeles First Nat. Trust & S. Bank*, 133 Misc. 630, 233 N.Y.S. 301 (1929); *Crofoot v. Giannini*, 196 Misc. 213, 92 N.Y.S.2d 191 (1949); *Rabinowitz v. Kaiser-Frazer Corp.*, 198 Misc. 312, 96 N.Y.S.2d 638 (1950); *Zarbell v. Bank of America Nat. Trust & Sav. Ass'n.*, 52 Wash.2d 549, 327 P.2d 436 (1958).

The *Crocker* case was cited with approval by this Court in its opinion in *First National Bank v. Morgan, supra.*

II

THE HISTORICAL BACKGROUND OF THE NATIONAL BANK ACT (1864) DOES NOT JUSTIFY APPELLEE'S CLAIM THAT THE STATE VENUE PROVISION OF 12 U.S.C. §94 IS INEFFECTUAL. THE HISTORICAL CONTEXT OF THE STATUTE REQUIRES A CONTRARY CONCLUSION.

Appellee's history argument (Brief for the Appellee, pp. 12-13, 19-26) attempts to avoid the effect of 12 U.S.C. §94 according to its plain terms by purporting to show a "futile and unnecessary" mistake by Congress in the enactment of the predecessor statute (§57 of The National Bank Act (1864)) now embodied in 12 U.S.C. §94. Attributing to Congress an intention to only legislate with reference to Congress' alleged misinterpretation of two leading deci-

sions of this Court, *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), appellee constructs a conclusion that Congress "undoubtedly intended" unnecessarily and vainly to confer upon state courts jurisdiction of suits against national banks, and that the pertinent second clause of §94 is accordingly a nullity.

No such result is warranted by history or otherwise.

First. Appellee cites no authority, and we believe there is none, for his statements as to what Congress "undoubtedly intended", "thought", "did not intend" (Brief for the Appellee, pp. 12-13); "thought necessary" (Id., pp. 20, 23); or was "supposed" to be doing (Id., p. 23). There is no analysis of §57 of the Act itself. Appellee's unsupported conjecture would not support his conclusion, even if inquiry into the minds of Congressmen were proper in considering the plain and unambiguous statute codified in 12 U.S.C. §94. *Ex Parte Collett*, 337 U.S. 55 (1949); *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945). This Court said in *Ex Parte Collett*, in language particularly appropriate to the case at bar (337 U.S. at 61):

> "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of §1404 (a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco, Inc. v. Walling* * * *. This canon of construction has received consistent adherence in our decisions."

Second. Appellee's conclusion does violence to the effect given the statute by this Court in *Casey v. Adams*, 102 U.S. (12 Otto) 66 (1880) and *First National Bank v. Morgan*, 132 U.S. 141 (1889). The Justices participating in these leading interpretations indicated no awareness of any historically-evident misinterpretation of Supreme Court decisions which appellee would attribute to the members of the Congress.

Third. Lastly, the historical context in which §57 of The National Bank Act was adopted by Congress, itself refutes appellee's contentions.

Congress recognized in 1864 the necessity that national banking associations possess the *capacity* to sue and be sued, and accordingly included in The National Bank Act §8 (12 U.S.C. §24, 13 Stat. 101) a provision enabling national banks to "sue and be sued, complain and defend, in any court of law and equity as fully as natural persons". Similar usual provisions had been contained in the legislation creating the first bank of the United States (1 Stat. 192, §3 (1791)) and the second bank of the United States (3 Stat. 269, §6 (1816)). Apart from the additional, specific federal court provisions included with respect to the second bank, these provisions conferred on the banks only a general capacity to sue and be sued. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) at 817. Contrary to appellee's "jurisdictional" discussion of §8 of The National Bank Act, it had nothing to do with the existence or nonexistence of jurisdiction over the subject matter of actions against national banks in state (or federal) courts.

Enjoying such general capacity, federally-created banks could sue — and be sued — in state courts otherwise possessing jurisdiction over the subject matter of actions to which such a bank might become a party. *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824); *Claflin v. Houseman*, 93 U.S. (3 Otto) 130 (1876). Congress, in the adoption of the second clause of §57 of The National Bank Act (1864), recognized literally in the statute the existence of "state, county, or municipal court[s] • • • *having* jurisdiction in similar cases". Such recognition negatives appellee's suggestion that Congress thought it was trying to *confer* jurisdiction upon state courts of actions against national banks.

There are, however, no federal courts of general jurisdiction in the usual sense. *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). The non-exclusive jurisdiction of the lower federal courts generally in 1864 was limited to cases involving diversity of citizenship with the requisite jurisdictional amount. Under *Deveaux* and *Turner* specific legislation would be necessary to confer general non-diversity federal jurisdiction in suits against national banks. *Osborn* did not overrule *Deveaux* (Brief for the Appellee, p. 25), but only held such legislation constitutional.

Congress in the first clause of §57 accordingly conferred upon courts of the United States jurisdiction over the subject matter of "suits, actions, and proceedings against any association under this Act." But there is no warrant for appellee's inference that because Congress in the first clause of §57 thus specifically enacted legislation conferring non-

diversity general *federal* court jurisdiction over suits against banks, that it also meant mistakenly and unnecessarily by the second clause of §57 to legislate to confer *state* court jurisdiction in similar cases.

Congress thus covered questions regarding capacity in §8 of the Act, and the necessary conferral of federal court jurisdiction in the first clause of §57 of the Act. Congress might have said nothing more, leaving state and federal venue to the operation of applicable state or federal law. But Congress instead chose to address itself to the venue of actions against national banks. This it did by the addition of a reference in §57, first clause, to United States courts "held within the district in which such association may be established"; and by addition of the whole second clause of §57 authorizing suits against banks in state or local courts "in the county or city in which said association is located". Such second clause, pertaining in no substantive way to capacity or jusidiction, could only have been included as a limitation on state venue complementary to the comparable provisions regarding federal venue as provided in the first clause.

Appellant submits that if any artificial Congressional "intention" is to be inferred from analysis of The National Bank Act in view of the then-existing fabric of decisional law, such intention must have been that Congress contemplated a comprehensive legislative scheme which recognized the general jurisdiction of state courts and conferred the general jurisdiction of federal courts, in actions against national banks; conferred the necessary capacity upon them to become parties to litigation in all competent courts; and

expressly limited the venue of actions against the banks by the restrictive designations of specific courts in which actions against them could be maintained.

III

AS A MATTER OF FEDERAL LAW AS WELL AS OF STATE LAW APPELLEE'S CAUSE IS NOT A LOCAL ACTION. MOREOVER, IT DOES NOT PURPORT TO BE LOCAL UNDER THE INSURANCE CODE OF TEXAS.

At the outset we wish to dispel the idea that appellant is contending (as stated by appellee, Brief p. 33) that *Casey v. Adams*, 102 U.S. (12 Otto) 66 (1880) was overruled by *First National Bank v. Morgan*, 132 U.S. 141 (1889). Neither this appellant nor the appellant in No. 91 has made any such contention in its opening brief. This appellant does urge that the narrow exception to the state venue provisions of Rev. Stat. §5198, for "local actions" announced in *Casey v. Adams* has no applicability to appellee's tort action seeking personal liability for damages herein. The Texas Supreme Court did not pass on the question in its opinion. (R. 396)

This Court held in *Casey v. Adams* that Rev. Stat. §5198, the statute codified in 12 U.S.C. §94, "relates to transitory actions only, and not to such actions as are by law local in their character." The Court pointed out that the "distinction between local and transitory actions is as old as actions themselves," and it continued that "local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated." These familiar distinctions led the Court to conclude that the contest in that

case over a fund in the custody of the court, realized from the sale of property in its geographical jurisdiction, was "clearly local in its nature." The Court emphasized that no personal claim was made against the bank.

It is equally clear under the standards of *Casey v. Adams* that the case at bar is no wise local. It involves solely a plenary personal claim for damages to recompense an alleged tort. Such actions are recognized by this Court to be transitory. In *Stewart v. Baltimore & O.R.R.*, 168 U.S. 445, 448 (1897) this Court held that

> "An action to recover damages for a tort is not local but transistory. . . ."

See also *Dennick v. Central R.R. Co.*, 103 U.S. (13 Otto) 11 (1881), holding that an action for trespass to the person is "always held to be transistory".

The allowance or denial of the federal venue right asserted by appellant is a matter of federal law and not state law. *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, 52-3 (1941). Under the above Supreme Court decisions, appellant's venue privilege does not fall within the "local action" exception to 12 U.S.C. §94.

Texas law differentiating between local and transitory actions, if applicable would require a similar result. The Texas Supreme Court distinguishes between local and transitory actions as follows, *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 14 S.W. 228 (1890):

> "If the cause of action be one that might have arisen anywhere, then it is transitory; if it could only have arisen in one place, then it is local."

See, also, *Texas & P. Ry. Co. v. Gay*, 86 Tex. 571, 26 S.W. 599 (1894), citing *Casey v. Adams*. Tested by this standard, appellee's action in the present case was a transitory action, because it is one that might have arisen anywhere.

Appellee nevertheless states (Brief for the Appellee, p. 28) that "this suit is a 'local action' by State Statute". For two reasons this assertion does not aid appellee.

First, the distinction between local and transitory actions discussed by this Court in *Casey v. Adams* had reference to basic principles "as old as actions themselves" and not to artificial distinctions based on labels that may be included in state statutes.

Second, §4(f) of Article 21.28 of the Texas Insurance Code does not purport to classify actions by or against the liquidator-receiver as local actions. In *Holt v. Wheeler*, 301 S.W.2d 678 (Tex. Civ.App. 1957, error dism'd) the court said at page 680:

> "Section 4(f) of Art. 21.28 is remedial or procedural because it deals exclusively with venue. It is not a statute dealing with substantive law."

Appellee contends (Brief for the Appellee, p. 29) that the Texas statute "requires all suits by or against the Liquidator-Receiver be instituted in the Court of competent jurisdiction of the County in which the delinquency proceeding are [sic] pending." Appellee is thus saying that he cannot bring suits in courts outside Texas against parties who cannot be found in Texas, and even that he cannot bring (or maintain removed) suits in the United States courts for

recoveries against third parties, for tax refunds, federal Tort Claims, bankruptcy, etc. The Texas venue statute is not subject to a so unreasonably strained construction.

IV

CONCLUSION

The relief requested by appellant in the Conclusion of its opening brief should be granted.

Respectfully submitted,

Marvin S. Sloman

MARVIN S. SLOMAN,

Hubert D. Johnson

HUBERT D. JOHNSON,

Of Carrington, Johnson & Stephens,
1700 Mercantile Bank Building,
Dallas 1, Texas,
Attorneys for Appellant.

PROOF OF SERVICE

I, Marvin S. Sloman, one of the attorneys for Mercantile National Bank at Dallas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on February 20, 1962, I served copies of the foregoing brief of appellant on the appellee by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record for appellee at the following post office addresses:

Cecil C. Rotsch, Esq.,
P. O. Box 13,
Austin, Texas.

Messrs. Keith, Mehaffy, McNicholas & Weber
Kaufman Trust Building,
Beaumont, Texas.

Messrs. Cureton & Lanham,
401 Professional Building,
Waco, Texas.

Marvin S. Sloman

MARVIN S. SLOMAN,
1700 Mercantile Bank
Building,
Dallas 1, Texas,
Counsel for Appellant.